NO. 87-1687

IN THE SUPREME COURT OF THE UNITED STATES

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IN RE: LEONARD J. ZEPKE

Petitioner in Prohibition or Mandamus

PETITION FOR PROHIBITION OR MANDAMUS

From the United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENT, CRAWFORD & COMPANY, IN OPPOSITION TO PETITION FOR PROHIBITION OR MANDAMUS

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LEONARD J. ZEPKE
Petitioner - In Pro Per
21819 Woodbridge Street
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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Respondent, Crawford & Company, refers this Honorable Court to the Disclosure of Corporate Affiliations and Financial Interest filed by Defendant-Appellee, Crawford & Company, in its Brief on Appeal to the United States Court of Appeals for the Sixth Circuit on or about April 28, 1987, wherein Crawford & Company made the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   Response: No.

2. Is there a publicly owned corporation not a party to the appeal, that has a financial interest in the outcome?

   Response: No.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

DID THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAVE JURISDICTION OVER THE MATTER AT BAR BASED ON DIVERSITY OF CITIZENSHIP AND ALLEGED DAMAGES IN EXCESS OF TEN THOUSAND DOLLARS ($10,000.00)?

U.S.District Court says: "Yes"

Court of Appeals says: "Yes"

Respondent says: "Yes"

Petitioner says: "No"

TABLE OF CONTENTS

INDEX OF AUTHORITIES CITED

CITATION TO OPINIONS AND JUDGMENTS BELOW

Leonard J. Zepke, Plaintiff-Appellant, v. Crawford & Company, a Georgia Corporation, Defendant-Appellee, in the United States Court of Appeals for the Sixth Circuit, NO. 86-1745 before the Honorable Circuit Judges Engel, Kennedy and Edwards. Oral argument heard on November 3, 1987. The Court of Appeals, on November 16, 1987, issued an Order affirming both the Order of the Magistrate Paul Komives of December 20, 1985 denying Plaintiff's Motion to Remand to the Circuit Court for the County of Wayne, State of Michigan (an Order itself affirmed by the Honorable George E. Woods on April 9, 1986, subsequent to Plaintiff's appeal from the Magistrate's Recommendations and Orders) and, the Judgment of the Honorable George E. Woods dated August 14, 1986. The matter was issued as a mandate by the Sixth Circuit Court of Appeals on December 2, 1987.

COUNTER-STATEMENT OF THE CASE

On or about September 18, 1985, Leonard J. Zepke, hereinafter referred to as "Petitioner", filed his Complaint against Crawford & Company, hereinafter referred to as "Respondent", in the State of Michigan, Circuit Court for the County of Wayne, naming as the sole Defendant,Crawford & Company. In his Complaint, the Petitioner admitted in Paragraph One that the Respondent is a foreign corporation.

Respondent, on October 7, 1985, filed its Petition for Removal, Bond for Removal, Affidavit of Filing in State Court, Notice of Filing Petition/Bond for Removal, Affidavit of Service and Proof of Service, in the United States District Court, Eastern District of Michigan, Southern Division, and the Circuit Court for the County of Wayne. The Petition for Removal was filed pursuant to 28 USC 1441 and averred that Federal Court diversity existed since the Respondent Corporation was

(a) a Georgia Corporation, (b) had its sole principal place of business in Atlanta,Georgia, and (c) the amount in controversy was asserted to be in excess of Ten Thousand Dollars ($10,000.00).

Petitioner filed a Motion to Remand with the United States District Court on or about October 23, 1985, to which Respondent filed a timely response on November 5, 1985.

Filed with the United States District Court was an Affidavit of James H. Graham, Corporate Secretary for Respondent, which Affidavit affirmed that Respondent was a Georgia Corporation with its sole principal place of business in Atlanta, Georgia.

On or about December 20, 1985, the Honorable Magistrate Paul J. Komives issued his Opinion and Recommendation that Petitioner's Motion to Remand be denied.

On or about December 27, 1985, the Petitioner filed his Appeal from the Magis-

trate's Recommendations and Orders.

On April 9, 1986, Assigned Judge, the Honorable George E. Woods of the United States District Court, Eastern District of Michigan, Southern Division, entered an Order Denying Petitioner's Motion to Remand and accepted the Magistrate's Report and Recommendations with regard to same.

In formal hearings before the Honorable George E.Woods on August 8, 1986, Judge Woods heard oral arguments on Respondent's Motion for Summary Judgment which Motion was ultimately granted.

Petitioner then filed an appeal with the United States Court of Appeals for the Sixth Circuit. Oral arguments were heard on November 3, 1987,and on November 16, 1987, the Court of Appeals, Sixth Circuit, issued an Opinion affirming the Honorable George E.Woods' decision. The matter was issued as a Mandate by the Sixth Circuit Court of Appeals on December 2, 1987.

Petitioner then filed the current Petition for Prohibition or Mandamus with this Honorable Court.

SUMMARY OF ARGUMENT

In his Petition, Petitioner seeks alternative remedies. With regard to Petitioner's prayer for a Writ of Prohibition, Respondent contends that this is an extraordinary Writ reserved for extraordinary situations, and is not warranted in that exceptional circumstances are not present in the matter at bar.

With regard to Petitioner's prayer for a Writ of Mandamus, Respondent contends that this is also an extraordinary Writ reserved for extraordinary situations, and is not warranted in that exceptional circumstances are not present in the matter at bar.

In the event that this Honorable Court additionally treats Petitioner's prayer as seeking relief through a Writ of Certiorari, Respondent contends that such a Writ is also not warranted in that special and important reasons, such as a division among the Federal Courts of Appeals, obvious jurisprudential

importance, or an important constitutional question are not present in the matter at bar.

In support of its position that the above relief is unwarranted in the matter at bar, Respondent contends that the entire procedure by which it removed the matter at bar from the State of Michigan,Circuit Court for the County of Wayne, to the United States District Court, Eastern District of Michigan,Southern Division, based on complete diversity of citizenship among the parties and alleged damages in excess of Ten Thousand Dollars ($10,000.00) was properly executed. As noted above, this very issue has been examined by a United States District Court Magistrate, a United States District Court Judge, and a Panel of the United States Court of Appeals for the Sixth Circuit, all of whom were of the opinion that diversity had been established and Respondent had an absolute right to remove the case to and have it tried in the United States District Court,

Eastern District of Michigan, Southern Division.

ARGUMENTS

In support of its contention that the relief sought by Petitioner is unwarranted in the matter at bar, Respondent states the following:

I. WRIT OF PROHIBITION NOT WARRANTED

In his Petition, Petitioner seeks a Writ of Prohibition. Respondent contends that the lower court clearly had jurisdiction necessary for the disposition of this matter. Petitioner now argues, however, for no fewer than a fourth time, that the lower court was without jurisdiction based on a defective removal pleading. Even in cases where the jurisdiction of the lower court is doubtful, as opposed to being clearly absent, the Writ of Prohibition will ordinarily be denied. In Re: Chicago, Rock Island & Pacific Railway Co., 255 U.S. 273, 275-276, 41 S.Ct. 288, 289, 65 L.Ed. 631,633 (1921). See also, In Re: United State Parole

Commission, 793 F.2d 338, 343n.,36 (D.C.Cir. 1986).

Respondent, as mentioned above, contends that the lower court clearly had jurisdiction. In order for Petitioner to cast a doubt on the lower court's jurisdiction, he would have to prove that an alleged mistake by the Honorable Magistrate Komives regarding the propriety of Federal jurisdiction was triplicated by both the Honorable Judge George E. Woods and a Panel of the Court of Appeals for the Sixth Circuit. Respondent contends that Petitioner has fallen fatally short in his effort to cast doubt on the jurisdiction of the court below, and that a Writ of Prohibition is not warranted in the matter at bar.

II. WRIT OF MANDAMUS NOT WARRANTED

In his Petition, Petitioner seeks the alternative remedy of a Writ of Mandamus. Jurisdiction has been given to the Circuit Court to determine whether a cause is one that

ought to be remanded. A Mandamus cannot be used to compel a Circuit Court to remand a cause after it once has refused a motion to that effect. Ex Parte Hoard, 105 U.S. 578,579, 26 L.Ed. 1176, 1177, S.C. 15 Otto, 578-80 (1882). See also, Roche v. Evaporated Milk Association, 319 U.S. 21, 30, 63 S.Ct. 938, 944, 87 L.Ed. 1185, 1193 (1943).

Petitioner motioned in the Sixth Circuit Court of Appeals to vacate the judgment below and remand the matter on numerous and redundant occasions. As indicated above, the Panel of the United States Court of Appeals for the Sixth Circuit unanimously affirmed the decisions of both the Honorable Magistrate Komives and the Honorable Judge Woods. Therefore, the Petitioner's prayer for a Writ of Mandamus is unwarranted and should be denied.

III. WRIT OF CERTIORARI NOT WARRANTED

In his prayer for relief, Petitioner seeks a Writ of Prohibition or, in the alternative,

a Writ of Mandamus. In the event this Honorable Court decides to treat the Petition as seeking additional relief through a Writ of Certiorari, Respondent contends that said Writ is only granted in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. Layne & Bowler Corp. vs. Western Well Works, Inc. 261 U.S. 387,393, 43 S.Ct. 422,423, 67 L.Ed. 712,714 (1923). See also, Sullivan vs. Little Hunting Park, Inc., 396 U.S. 229,250, 90 S.Ct. 400, 411, 24 L.Ed.2d 386,400 (1969).

As the Honorable Mr. Chief Justice Vinson said before the American Bar Association on September 7, 1949:

> "[The Supreme Court] is not and never has been, primarily concerned with the correction of errors in lower court decisions". Gressman, Much Ado About Certiorari, 52 Geo. LJ 742,755 (1963-64).

In addition, Mr. Chief Justice Taft, made the following relevant comment at the hearings before the House Committee on the judiciary in 1922:

> "No litigant is entitled to more than two chances...When a case goes beyond that, it is not primarily to preserve the right of the litigants." Gressman, Id.[1]

First, Respondent contends that there was no error in the lower court decisions. Second, Respondent contends that this is not the type of case which warrants a Writ of Certiorari in that none of the situations cited above which warrant such a Writ are present in the matter at bar. Therefore, a Writ of Certiorari is not warranted in the case at bar and should not be granted to the Petitioner.

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[1]Mr.Eugene Gressman received his AB and JD from the University of Michigan. At the time he wrote this article he was a member of the Bars of the District of Columbia and the States of Maryland and Michigan. Mr. Gressman was co-author of Stern & Gressman, Supreme Court Practice (3rd Ed. 1962).

IV. REITERATION OF CONTENTIONS BELOW IN SUPPORT OF RESPONDENT'S PRAYER FOR DENIAL OF RELIEF SOUGHT BY PETITIONER

There is no question whatsoever that the Respondent was and is a Georgia Corporation and that its sole principal place of business was and is in Atlanta, Georgia, by virtue of the assertions of Defense Counsel as an Officer of the Court and by further assertions of James H.Graham via his Affidavit as Corporate Secretary for Respondent.

The Removal was proper pursuant to 28 USC 1441 and 28 USC 1446.

In addition, Respondent affirms that 28 USC 1332 provides in pertinent part as follows:

> "The District Court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interests and costs and is between (1) citizens of different states...." (emphasis added)

Petitioner's position in this matter has gone from the ridiculous to the sublime. His

requests have now been denied by a United States District Court Magistrate, a United States District Court Judge, and a Panel of the United States Court of Appeals for the Sixth Circuit.

Respondent wishes to bring to this most Honorable Court's attention the fact that, when drafting its Removal pleadings, it used Form II of the Appendix of Forms, Federal Civil Judicial Procedure and Rules,West Publishing Company 1985 Edition as a form. That form remained unchanged in the 1987 Edition.

Further, Federal Rule of Civil Procedure for the United States District Court No. 84, provides as follows:

> "The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Federal Civil Judicial Procedure and Rules, West Publishing Co., 1985 Ed.

Based on the above, Respondent contends that any relief sought by Petitioner is un-

warranted, and that this Most Honorable Court should deny the Petitioner any relief as such relief is unwarranted.

CONCLUSION

WHEREFORE, Respondent, CRAWFORD & COMPANY, prays that this most Honorable Court deny Mr. Leonard J. Zepke's Petition for Prohibition or Mandamus as well as award costs and attorney fees so wrongfully incurred.

ECCLESTONE,MOFFETT & HUMPHREY,P.C.

BY_____

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CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
)§
COUNTY OF OAKLAND)

FREDERICK G.ECCLESTONE, being first duly sworn, deposes and says that on the 5th day of May, 1988, he served three (3) copies of Respondent Crawford & Company's Brief in Opposition to Petition for Prohibition or Mandamus on Petitioner, Leonard J. Zepke, by enclosing said copies in an envelope properly addressed to Leonard J. Zepke at his last known address of 21819 Woodbridge Street, St. Clair Shores, Michigan 48080, and said envelope was deposited in the United States Post Office mail receptacle in Birmingham, Michigan, with postage thereon duly prepaid.

FREDERICK G.ECCLESTONE

Subscribed and sworn to before
me this 5th day of May, 1988

Notary Public, Oakland County,MI

My commission expires: 6/10/89

CERTIFICATE OF MAILING

STATE OF MICHIGAN)
)§
COUNTY OF OAKLAND)

FREDERICK G.ECCLESTONE, being first duly sworn, deposes and days that on the 5th day of May, 1988, he mailed to the Clerk of the Court of the United States Supreme Court, forty (40) copies of Respondent Crawford & Company's Brief in Opposition to Petition for Prohibition or Mandamus by enclosing said copies in a Federal Express overnight mail package properly addressed to the Clerk of the United States Supreme Court, Washington, D.C. 20543, and deposited said package in the Federal Express mail receptacle in Birmingham, Michigan.

FREDERICK G.ECCLESTONE

Subscribed and sworn to before
me this 5th day of May, 1988

Notary Public,Oakland County,MI

My commission expires: 6-10-89